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23 UNITED STATES DISTRICT COURT

24 NORTHERN DISTRICT OF CALIFORNIA

25 SAN FRANCISCO DIVISION

26 SONOS, INC.,

27 Plaintiff,

28 vs.

GOOGLE LLC,

Defendant.

Case No. 3:20-cv-06754-WHA

Related to Case No. 3:21-cv-07559-WHA

**GOOGLE LLC'S RESPONSE TO SONOS,
INC.'S PROFFER RE REVENUE
PURPORTEDLY ASSOCIATED WITH
ACCUSED PRODUCTS**

1 In response to Google’s Motion *in Limine* No. 4, Sonos expressly “agree[d] not to reference
2 financial information unrelated to the accused products.” Dkt. 619-9 at 1, 5. Yet Sonos is seeking
3 to do just that through its demonstrative slide (PDX3.32) and the corresponding exhibit (TX6256),
4 which contain financial information regarding Pixel devices (without the Google Home app),
5 Search, and Play—*none* of which is accused. Because Sonos’s proffer fails to tie this financial
6 information to the accused products, the Court does not need to revisit its tentative ruling excluding
7 this evidence.

8 **A. The Table Sonos Seeks To Admit Is Irrelevant And Should Be Excluded**
9 **Under FRE 402**

10 The table Sonos seeks to admit purports to summarize “Search + Play Indirect Revenue
11 Channeled Through Pixel.” PDX3.32; TX6256. This information is not relevant to damages or any
12 other issue in the case.

13 *First*, Sonos argues that the table is relevant because “Pixel devices are accused products.”
14 Dkt. 727 at 1. That is not correct. Pixel devices *alone* are not accused—rather, Sonos contends that
15 “Pixel smartphone, tablet, and computer devices . . . *that are installed with the Google Home app*”
16 infringe the ’966 patent. Dkt. 620-4 at 4 (emphasis added). But the table does not mention the
17 Google Home app at all. There is no indication that the Pixel devices included in this table even
18 have the Google Home app installed, making the financial information irrelevant to any accused
19 product or the claimed invention.

20 *Second*, the table also relates to two products that are undisputedly not accused, Google’s
21 “Search” engine and Google’s “Play” Store, the online platform where Android users can purchase
22 mobile apps and digital media. Mr. Malackowski does not connect revenue from these two
23 unaccused products to the claimed speaker grouping functionality. Indeed, the portion of Mr.
24 Malackowski’s report discussing Google’s purported “strategy” of increasing hardware device sales
25 to “generate . . . additional revenue from Google’s valuable search and data business” merely relies
26 on *ipse dixit* and the type of third-party news articles the Court has previously excluded. Dkt. 616-
27 4 at 103-106; Dkt. 660 at 3. And nowhere does Mr. Malackowski or Sonos offer any proof that
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1 anyone bought a Pixel so they could download the Google Home app and thereby generate
2 additional revenues for Google.

3 Sonos claims that the financial information would be “helpful in showing the jury that, in
4 understanding the bargaining position of the parties to the hypothetical negotiation, it should not
5 look to Google’s *profit* from sales of hardware, but rather the *revenue* Google earns from the
6 products.” Dkt. 727 at 2. But neither expert utilizes Google’s profits or revenues to calculate
7 damages for the patents. Mr. Malackowski’s analysis is based on the IFTTT app, and Google’s
8 damages expert calculates damages based on the cost of implementing non-infringing alternatives
9 and a comparable patent agreement.

10 *Third*, the vast majority of the financial information in the table involves revenues from
11 countries other than the United States. Dkt. 728-2 (reflecting information for Great Britain (GB),
12 Canada (CA), Japan (JP), Australia (AU) and Rest of World (ROW)). This information is irrelevant
13 given that Sonos is not seeking damages based on any foreign sales.

14 **B. Any Purported Relevance Would Be Outweighed By Prejudice To Google**

15 Federal Rule 403 permits a court to “exclude relevant evidence if its probative value is
16 substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading
17 the jury.”

18 Sonos’s attempt to put a significant revenue number that is untethered to the claimed
19 technology in front of the jury would serve to “misleadingly suggest[] an inappropriate range” of
20 damages. *Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1327 (Fed. Cir. 2014); *Uniloc USA, Inc.*
21 *v. Microsoft Corp.*, 632 F.3d 1292, 1320 (Fed. Cir. 2011) (“The disclosure that a company has made
22 \$19 billion dollars in revenue from an infringing product cannot help but skew the damages horizon
23 for the jury, regardless of the contribution of the patented component to this revenue.”). As the
24 Court paraphrased Google’s argument, “it would be . . . too fantastic to assume that people buy the
25 Pixel simply because there is the Home app . . . and, therefore, getting into all these extra numbers
26 is just laying a lot of big numbers in front of the jury.” 5/12/23 Trial Tr. at 1112:6-12.

1 Mr. Malackowski has already made the general argument that Google earns additional
 2 revenue from other unaccused products.¹ The “minimal probative value” of these large revenue
 3 figures “to issues actually being decided by the jury is substantially outweighed by the risk of unfair
 4 prejudice[.]” *Biomerieux, S.A. v. Hologic, Inc.*, No. CV 18-21-LPS, 2020 WL 583917, at *2 (D.
 5 Del. Feb. 6, 2020) (excluding evidence of “revenues not tied to the accused products and not tied to
 6 Plaintiffs’ expert opinion regarding a reasonable royalty”).

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 8 DATED: May 15, 2023

QUINN EMANUEL URQUHART & SULLIVAN,
 LLP

9
 10 By: /s/ Sean Pak
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11 *Attorneys for GOOGLE LLC*
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26 ¹ As discussed on the record on May 15, 2023, Google will not emphasize the lack of evidence
 27 supporting Sonos’s “loss leader” theory. 5/12/23 Trial Tr. at 1112:1-5, 1113:2. (THE COURT: .
 28 . . In closing argument and anywhere else in this case, are you going to say something like,
 “Well, there’s no proof of any loss leader”? MS. BAILY: No.)

CERTIFICATE OF SERVICE

Pursuant to the Federal Rules of Civil Procedure and Local Rule 5-1, I hereby certify that, on May 15, 2023, all counsel of record who have appeared in this case are being served with a copy of the foregoing via the Court's CM/ECF system and email.

DATED: May 15, 2023

By: /s/ Sean Pak
Sean Pak